In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 883

UNITED STATES OF AMERICA, PETITIONER

v.

BLACK DIAMOND STEAMSHIP CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Several matters in respondent's brief in opposition to the petition for a writ of certiorari require a short reply.

1. Respondent's suggestion (Br. in Opp. 5–6) that the decision below turns on the "individual facts" of this case is incorrect. The other pending cases in which charterers have raised "averaging" claims (referred to at p. 11 of the petition in this case and listed at pp. 14–15 of the brief in opposition) all involve the identical charter provision, the same ship-charter program under Section 5 of the Merchant Ship Sales Act of 1946, and the same 1950 Regulation of the Maritime Commission rejecting averaging claims un-

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der such charters. The decision below holds that these charterers may wait until two years after their accounts are finally "squared off" to bring suit. In none of the pending cases—and indeed, so far as we are aware, in none of the many charter hire cases already decided—were the accounts "squared off" more than two years before suit was brought. Thus, the rule adopted below would render *all* these suits timely, and no particularities of this case deprive the decision here of general importance.[1]

2. Respondent's suggestion that no conflict exists between the Second and Fourth Circuits on the time-bar issue is also incorrect.[2] Judge Smith's opinion for the court of appeals sitting *en banc* in *American Foreign Steamship Co.* v. *United States*, 291 F. 2d 598 (C.A. 2), is, as we show in the petition, squarely in conflict with the opinion below in this case. As re-

[1] Respondent's suggestion that the particular correspondence and journal entries in this case were critical to the result below (Br. in Opp. 5) is erroneous. In fact, the correspondence between the Maritime Commission and respondent here does not differ materially from the correspondence between the Commission and other charterers. See, *e.g.*, *American Eastern Corp.* v. *United States*, 133 F. Supp. 11, 14 (S.D.N.Y.), affirmed *per curiam*, 231 F. 2d 664 (C.A. 2), certiorari denied, 351 U.S. 983. As stated in the text, we are aware of no case in which the correspondence or entries showed the accounts to be "squared off" more than two years before suit.

[2] Respondent's insistence that the conflict between the circuits "is neither important nor of any great present significance now that the nature and merits of the cumulation claims have been settled in *Moore-McCormack*" (Br. in Opp. 9) is a *non-sequitur*. If the merits of the claim were "settled" as respondent asserts, then the time-bar question would become more, not less, crucial to the disposition of these cases.

spondent does not dispute, its claim would have been dismissed in the Second Circuit; nor does respondent dispute the fact that most, if not all, of the other pending averaging claims would be held time barred in the Second Circuit.[2]

Respondent urges that the concurrence of Judges Clark and Waterman, who with Judge Smith constituted the majority in *American-Foreign*, may be discounted because those judges joined the opinion of the court only because of their adverse view as to the merits of averaging claims like respondent's. At best, however, respondent's argument tends to show that not only has the Court of Appeals for the Second Circuit squarely disagreed with the decision below on the application of the statute of limitations to averaging claims, but that two judges of that court would also disagree as to the merits of the charterers' claims with the Fourth Circuit's decision in *United States* v. *Moore-McCormack Lines, Inc.*, 308 F. 2d 866, certiorari denied, 372 U.S. 944. Judges Clark and Waterman did not, as respondent asserts (Br. in Opp. 7), regard claims identical to respondent's as untimely "only" because they believed, contrary to the *Moore-McCormack* holding, that the additional hire owed was to be computed on a yearly basis, and not over the life of the charter. Rather, those judges also pointed out that the prolonging of the litigation of claims arising under these charters which results from the

[2] In a case decided after *Moore-McCormack*, the Second Circuit gave no indication that the *American-Foreign* rule was open to question in that court. Cf. *Luckenbach Steamship Co.* v. *United States*, 312 F. 2d 545 (C.A. 2).

charterers' position "would need to be clearly suggested by contract language and background before it could be accepted. But that quite clearly is not the case here; neither the language nor the inconclusive background brings this out" (291 F. 2d at 610). Additionally, they stressed that the previous disposition of the limitations issue in *American Eastern Corp* v. *United States*, 133 F. Supp. 11 (S.D.N.Y.), affirmed *per curiam*, 231 F. 2d 664 (C.A. 2), certiorari denied, 351 U.S. 983, was correct (265 F. 2d at 148, 149, 152–153). That decision clearly does not depend on the view that additional hire was to be calculated upon an annual basis.

In short, the opinion of Judges Clark and Waterman on the limitations question stands separate from their view of the merits of respondent's averaging claim; in addition, Judges Clark and Waterman disagree with the Fourth Circuit on the merits of the averaging claim—which is the second question presented in our petition.

3. Respondent also contends that this Court should not review the decision below because it is right "as a matter of individual justice" (Br. in Opp. 4). Aside from the fact that persons holding "just" claims against the Government must assert them within the statutory period, the alleged injustice of which respondent now belatedly complains[4] does not exist.

[4] Respondent refers (Br. in Opp. 4) to the statement by the court below (Pet. App. 15a) that the delay in bringing suit "even if inordinate, has not injured the United States for it has been possessed of the money ever since the funds were claimed to be due." Far from supporting the result below,

In this suit, as in the *Moore-McCormack* case, the charterer profited during early years of the charter and, of its own free will, chose to renew the charter. Now respondent seeks to force the Government to share its losses in those later years by permitting them to be set off against earlier profits in computation of charter hire for the earlier years. Not only is this procedure not justified by either the charter or the applicable statute; it also undercuts the principal Congressional policy in enacting the Merchant Ship Sales Act of 1946 (50 U.S.C. App. 1738)—which was to sell ships. Cf. *Massachusetts Trustees* v. *United States*, 377 U.S. 235, 241–242. A rule permitting "averaging" of losses with earlier profits confers a benefit upon charterers even if their rental operations result in a loss, thus providing an incentive to continue to rent ships rather than to purchase them. Such a rule is plainly inconsistent with the legislative policy to promote sales.[5]

4. Finally, respondent takes issue with our statement (Pet. 11) that the time-bar issue is presented in approximately 20 cases brought by 15 charterers in district courts in four circuits which involve roughly

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this statement confirms that insufficient consideration was given below to the most elementary purpose of statutes of limitations—the prevention of stale claims, which are difficult to defend, and which deny the defendant certainty regarding his liabilities within a reasonable time.

[5] The merits of respondent's claim were not discussed below, as respondent correctly states, because (a) the district court held that the claim had not been timely asserted and (b) the Fourth Circuit already had decided the merits in *Moore-McCormack*.

2 to 3 million dollars exclusive of interest. According to respondent's estimates, there are 15 such cases brought by 12 charterers involving about $700,000 exclusive of interest. While we believe that our estimate is accurate,* even under respondent's estimate the present case plus the pending cases involve almost 1 million dollars in more than a dozen separate law suits in four circuits. Moreover, interest, if allowable, would add approximately 60 per cent to these claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

FEBRUARY 1966.

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*Respondent is correct with regard to one case; the libels in *So. Atl. S.S. Line* v. *United States*, which we listed as pending, have been dismissed.

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